LIBRARY
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

October Term 1968

No. 490

Office-Supreme Court, U.S.
FILED
FEB 6 1968
JOHN F. DAVIS, CLERK

JAMES BOYD, BERNARD HUGHES, CECIL RALPH HENDRIX, and CHARTER TAYLOR, Jr.,

Plaintiffs-Appellants

v.

RAMSEY CLARK, as Attorney General of the United States, LEWIS B. HERSHEY, as Director of Selective Service of the United States, PAUL AKST, as Director of Selective Service of the City of New York, SELECTIVE SERVICE BOARD No. 44 of the City of New York, and SELECTIVE SERVICE BOARD No. 2 of the City of New York,

Defendants-Appellees.

On Appeal
From The United States District Court
For The Southern District of New York

PETITION FOR REHEARING

Victor Rabinowitz,
Leonard B.Boudin,
30 East 42nd Street
New York,N.Y. 10017
Attorneys for Plaintiffs-Appellants

Dorian Bowman
Of Counsel

February 4, 1968

SUPREME COURT OF THE UNITED STATES

October Term, 1968

No. 490

JAMES BOYD, BERNARD HUGHES, CECIL RALPH HENDRIX, and CHARTER TAYLOR, JR.,

Plaintiffs-Appellants

v.

RAMSEY CLARK, as Attorney General of the United States, LEWIS B. HERSHEY, as Director of Selective Service of the United States, PAUL AKST, as Director of Selective Service of the City of New York, SELECTIVE SERVICE BOARD No. 44 of the City of New York, and SELECTIVE SERVICE BOARD No. 2 of the City of New York,

Defendants-Appellees.

On Appeal
From The United States District Court
For the Southern District of New York

PETITION FOR REHEARING

Plaintiffs hereby petition this Court for a rehearing of its decision dated

January 13, 1969, affirming, without argument, the decision of a three-judge statutory court sitting in the Southern District of New York dismissing the complaint herein. This Court is respectfully requested to note probable jurisdiction of the appeal from that decision.

On December 17, 1968, subsequent to the filing of a jurisdictional statement in this case, this Court decided Clark v. Gabriel, ___ U.S.___, 89 Sup. Ct. 424, 37 U.S.L.Week 3217, and Oestereich v. Selective Service System Board No. 11, ___ U.S.___, 89 Sup.Ct. 414, 37 U.S.L.Week 4053. The former decision was cited by this Court in affirming the decision of the court below in the instant case.

In Oestereich, Gabriel and this case, plaintiffs sought a pre-induction injunction and all three involve the application

of §10(b)(3) of the Military Selective Service Act, 50 U.S.C. App. §460(b)(3). In the Gabriel case, the Court held §10(b)(3) applicable when the registrant sought judicial review of the validity of his classification, claiming that it had no basis in fact. In Oestereich, this Court held §10(b)(3) to be inapplicable when the registrant claimed that he was entitled to a statutory exemption from the draft. In its opinion in the latter case, this Court stated that in such situations "there is no exercise of discretion by a Board in evaluating evidence and determining whether a claimed exemption is deserved" (89 S.Ct. at 416).

The instant case is easily distinguishable from Gabriel; indeed, if Oestereich was correctly decided, then a fortiori, §10(b)(3) is not applicable to this case. Here, plaintiffs allege that the student deferment

provisions of the Military Training and Service Act of 1967 and the regulations enacted thereunder were unconstitutional (a) in that they discriminated against persons such as themselves who were economically unable to attend college and (b) that the classification of registrants into two groups - students and non-students - was an arbitrary and discriminatory classification bearing no reasonable relationship to the purposes of the Act.

In appointing a three-judge court, the District Court found that the constitutional question was a substantial one. The statutory court denied relief without reaching the constitutional issue, holding that §10(b)(3) applied and that the jurisdictional amount required under 28 U.S.C. 1331 was

not established.

The instant case provides even stronger grounds for relief than Oestereich and better reasons for holding §10(b)(3) inapplicable. The issue here is a constitutional one; that in Oestereich was statutory. Even more important, plaintiffs here do not challenge their classification at all. Cf. Harlan, J. concurring in Oestereich, 89 S.Ct. at 417. They are complaining rather that the Act exempts from its operation over a million registrants on grounds which are discriminatory and in violation of the Fifth Amendment, and that they are injured by such discrimination. There is no possible appeal within the Selective Service for these plaintiffs because there is no ruling of the Board from which they can appeal, i.e., given the

terms of the Act, their classification was proper. Oestereich at least had some remedy from the action of his Local Board, namely, the possibility of an administrative appeal within the Selective Service System; here there is none. Both cases are characterized by the fact that there is no exercise of discretion by the Board to determine whether a claimed exemption is appropriate, but in this case the Board has no power at all to correct the wrong done to plaintiffs by re-classifying them.

With all due respect to the decision of this Court, this case bears little resemblance to Gabriel, in which there was an issue concerning the proper classification of the registrant and a fact-finding function which the Board could perform.

The result of this Court's affirmance in this case is to compel plaintiffs to violate the law, with its severe criminal sanctions, to secure consideration of their constitutional claims which heretofore have never been considered either by a court or any administrative agency. Ex Parte Young, 209 U.S. 123.

CONCLUSION

For the reasons set forth above and in the Jurisdictional Statement, it is respectfully urged that a rehearing be granted and that upon such rehearing probable jurisdiction be noted.

Respectfully submitted,

VICTOR RABINOWITZ
LEONARD B. BOUDIN

30 East 42nd Street
New York, N.Y. 10017

Attorneys for Plaintiffs-Appellants

Dorian Bowman

Of Counsel

February 4, 1969

CERTIFICATE OF COUNSEL

This is to certify that the Petition for Rehearing is presented in good faith and not for the purpose of delay.

Victor Rabinowitz